

however, requires the filter to be located substantially within the canister in addition to being interposed in the fluid connection between the canister and the pump. The recitations are clearly consistent. No new matter has been added. Withdrawal of the rejection is therefore respectfully requested.

Claim 21 is objected to for depending from itself. Applicant apologizes for the typographical error in claim 21, which has been corrected. No new matter has been added. Withdrawal of the rejection and examination of claim 21 is therefore respectfully requested.

Claim 26 stands rejected under 35 USC §102(e) as being anticipated by U.S. patent No. 5,466,229 issued November 14, 1995 to Elson *et al.* ("Elson"). Claim 26 has been amended to more clearly define the porous pad recited in the first element. In particular, Applicant recites certain of the structural properties of the porous pad as particularly adapt the pad for the communication of negative pressure to the wound surface. These features being clearly absent the teachings of Elson, Elson cannot anticipate claim 26. No new matter has been added. Withdrawal of the rejection and allowance of the claim are therefore respectfully requested.

Claims 1 through 6, 16 and 18 through 20 stand rejected under 35 USC §102(e) as being anticipated by Elson or, in the alternative, under 35 USC §103(a) as unpatentable over Elson. Claim 1 has been amended to more clearly recite certain of the structural properties of the porous pad as particularly adapt the pad for the transmission of negative pressure to the sound surface, thereby promoting wound healing. These features being clearly absent the teachings of Elson, Elson cannot anticipate claim 1.

The remaining rejections each rely upon Elson as a base reference for the application of 35 USC § 103(a). In addition to the aforementioned rejections, claim 17 stands rejected under 35 USC §103(a) as being unpatentable over Elson in view of U.S. patent No. 4,631,061 issued December 23, 1996 to Martin ("Martin") and claim 7 stands rejected under 35 USC §103(a) as being unpatentable over Elson in view of U.S. patent No. 5,437,651 issued August 1, 1995 to Todd *et al.* ("Todd"). Although there exist many instances where the Office has failed to show the suggestion required to make a *prima facie* case of

obviousness and certain improper assumptions and conclusions have been made¹, Applicant generally traverses the remaining rejections upon the ground that Elson is neither analogous nor pertinent the problem with which Applicant is concerned. Applicant realizes that Elson is the base reference in the rejections. Applicant also takes the Examiner at his word that the so-called non-analogous art argument most often arises in the context of a secondary reference being relied upon to supply a deficiency of the base reference. Applicant also acknowledges that the Examiner has stated that he “has no idea where applicant’s position comes from.” As a result, Applicant now relies on the previously developed arguments with respect to the status of Elson as analogous or pertinent art and attempts only to direct the Examiner to that authority upon which Applicant contends the arguments apply to base references as well as secondary references.

The doctrine of analogous and pertinent art is statutory in origin. It does not apply to rejections made under 35 USC §102, but only to those made under 35 USC §103. In pertinent part, §103 requires grant of the patent unless “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill *in the art to which said subject matter pertains*.” 35 USC §103(a) (emphasis added). The emphasized portion of the statute provides the basis for the doctrine. *See generally In re Clay*, 966 F.2d 656 (Fed. Cir. 1992). There is no mention in either the statute or the case law of any basis upon which a base reference might be treated differently from a secondary reference. In fact, argument can be made that a base reference, especially if the only reference relied upon, falls more under the doctrine than does a secondary reference for what is there other than an inventor’s ordinary skill in a particular subject matter to direct the inventor to a base reference? Quite simply nothing! All references

¹ For example, in ¶7 of the Office Action (page 6), it is stated that the “examiner considers polyether foam and polyurethane foam to be the same thing.” Applicant recites in claim 7 that the foam previously recited “is a polyether reticulated foam having at least 95% interconnecting cells.” Although the Examiner has provided no basis for his assertion of equivalence and admits the failure of the base reference to disclose the limitation, the Office Action nonetheless charges forward with the conclusion that it would have been obvious to one of ordinary skill in the art to (1) first substitute for the polyurethane foam of Todd a polyether foam, (2) limit that polyether foam to a reticulated foam having at least 95% interconnecting cells and then (3) substitute the greatly modified foam of Todd for that of Elson. This is clearly unsupported hindsight reconstruction of Applicant’s invention and is improper.

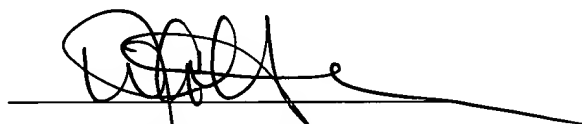
properly relied upon under 35 USC §103(a) must be either analogous or pertinent to the problem with which the inventor was faced. Reconsideration of Applicant's previous arguments, withdrawal of the rejections and allowance of the claims are therefore respectfully requested.

In light of all the foregoing, Applicant respectfully requests reconsideration and allowance of the claims and passage to issue of this present application.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Wayne J. Colton', written over a horizontal line.

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